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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 235

THOMAS FLOYD ROBINSON,
Petitioner,

vs.

THE STATE OF ALABAMA,
Respondent.

6th Div. 618.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

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6th Div. 618.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner petitions this Honorable Court for a writ of certiorari to the Court of Appeals of Alabama, to review and determine the decision rendered by said Court.

Respectfully submitted,

MATT H. MURPHY, JR.,
Attorney for Petitioner.

Your petitioner, Thomas Floyd Robinson, through his attorney of record, Matt H. Murphy, Jr., of Birmingham, Alabama, hereby respectfully petitions this Honorable Court to review and determine the decision rendered by the Court of Appeals of Alabama, in that certain appeal in said court numbered and styled: Sixth Division, No. 618, Thomas Floyd Robinson vs. The State of Alabama. Not officially reported.

(a) Petitioner was convicted under an indictment charging him with the carnal knowledge of, or abuse in the attempt to carnally know, a girl under twelve years of age; and was sentenced to the penitentiary for ten years.

(b) The jurisdiction of this Honorable Court is invoked because petitioner contends that he has been denied the rights and privileges conferred by the "due process" clause of the Constitution of the United States.

(i) The Court of Appeals of Alabama rendered judgment of affirmance in the above styled cause on December 1, 1953.

(ii) Timely application for a rehearing was made to said Court of Appeals, and by said court overruled on January 5, 1954.

Timely petition for a writ of certiorari to the said Court of Appeals, was filed in the Supreme Court of Alabama. The Supreme Court of Alabama declined jurisdiction by denying the writ.

Timely application for a rehearing was then made to the Supreme Court of Alabama, and on April 22, 1954, the Supreme Court of Alabama overruled said application for a rehearing.

It is respectfully submitted that by the action of the Supreme Court of Alabama, in denying the writ, that thereupon the Court of Appeals of Alabama became the court of last resort.

Application for stay of judgment in the granting to the petitioner of the right to apply for a writ of certiorari from the Supreme Court of the United States to the Court of Appeals of Alabama, was granted by said Court of Appeals on the 6th day of May, 1954. Said Court of Appeals granted a stay of ninety days within which time petitioner is required to apply for said writ of certiorari to the Supreme Court of the United States.

(iii) The statutory provision, believed to confer on this Honorable Court jurisdiction to review the judgment by writ of certiorari, is 28 U. S. C. A., Section 1257 (3).

(c) During the course of the trial before a jury, it was made known to the trial judge, that a witness, while on the stand, under oath, and being questioned by counsel for the defense, was receiving negative and positive signals from a bystander in the court room. Both the witness and the bystander admitted in open court that positive and negative signals had been transmitted by the bystander and received by the witness.

Motion for a mistrial was made on the grounds that this course of conduct denied petitioner a fair and impartial trial under United States Constitution. This motion was overruled by the trial court and exception reserved. On appeal, the Court of Appeals of Alabama affirmed the decision of the lower court.

(d) The constitutional provision that this case involves and relied on, is U. S. C. A., Constitutional Amendment 14, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state de-

prive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(e) Petitioner respectfully submits that his statement of the case called for in the rules under (e) is covered in (c), supra.

Mr. Binzel, father of the prosecutrix and Alvin, while being questioned as a witness, testified that he nodded in assent after Alvin made an answer to a question (Trans. p. 111).

In answer to another question, Mr. Binzel stated that while Alvin was being questioned, he shook his head from side to side during the question (see Trans. p. 204).

Alvin Binzel, the seven year old brother of the prosecutrix, and son of Mr. Binzel, was on the witness stand, under oath, and testifying, and the following questions were answered in the following manner:

"Q. Did you see him (your father) shaking his head when I asked you that question?

A. Right after you asked it?" (Trans. p. 199.)

"Q. Right after I asked the question, did you see him shake his head like this (indicating), from side to side?

A. 'Yeah'" (Trans. p. 199).

"Q. Did you see him on another occasion shake his head up and down (indicating)?

A. He went like this (indicating) and then like this (indicating)" (Trans. p. 200).

"Q. In other words, he shook his head this way (indicating) and on another occasion, he shook his head up and down, is that correct?

A. 'Yes'" (Trans. p. 204).

(f) The federal question sought to be raised came at a stage in the proceedings in the court of first instance by a

motion for mistrial, immediately following Alvin Binzel's testimony, questions and answers as set out above. The motion was overruled and exception reserved. The motion is hereby set out as it appears in the Transcript, page 202:

> "Mr. Murphy: On this ground: That when a defendant is on trial in a court of justice in a criminal matter, especially a serious charge of this nature, he is guaranteed by the Constitution of the United States and the courts of the State of Alabama to a fair and impartial trial, and, certainly, there can be no fairness in a proposition where a person who is sitting back in the back of the courtroom and who is calling signals and designating how a witness can testify. That is a fair inference that may be drawn on what actually occurred here. And, if you have a man who is back in the courtroom, nodding and shaking his head, with a witness on the stand who is testifying in regard to a criminal matter, there can be no fairness and justice if that sort of practice could go on; certainly, we would have nothing but a legal shamble if a man back in the courtroom tells a witness what to say in a criminal matter where a man's life is at stake. And on those grounds we move for a mistrial."

The manner in which the federal question sought to be reviewed was raised in the Appellate Court, was embodied in the motion for a mistrial, said motion being fully set out in the transcript of the record, and was before the Court of Appeals on the appeal of this cause, when the case was affirmed.

ARGUMENT.

(h) Petitioner respectfully submits that the state courts have decided a federal question of substance, in a way probably not in accord with the applicable decisions of this court.

The transcript shows that the trial judge, in overruling the motion for a mistrial, put the stamp of approval on a course of conduct which did not adhere to established procedure, the law of the land, and deprived the petitioner of a fair and impartial trial under the United States Constitution, in violation and denial of rights under the "due process" clause of said constitution.

Petitioner respectfully submits that a fair interpretation of the transcript, in connection with the questions and answers of Alvin Binzel and his father, condensed, would be about as follows:

That some answers made by Alvin were not answers to questions put by counsel, but were in conformity with the positive or negative signals given or made by his father.

Further, that, in reality, the jury was hearing, through Alvin, some answers not responsive to questions put by counsel, but answers in conformity with signals given or made by the father and relayed by Alvin to the jury.

Petitioner further submits that the foregoing course of conduct, reveals that the action of the trial court was a denial of rights of the petitioner under the "due process" clause of the constitution, and a failure to observe that fundamental fairness essential to the very concept of justice. Brown v. State of Mississippi, 297 U. S. 278, 80 L. Ed. 682, U. S. C. A., Constitutional Amendment 14, Section 1, DC Idaho, Louie Young v. Coleman, 5 Fed. Supplement 702.

Petitioner earnestly contends that the motion for a mistrial was sufficient for the presentation of the federal

question to the trial court, for that it appears from the motion that such rights were set up and claimed in such a manner as to bring the federal question directly and unmistakably to the attention of the trial court.

No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient, if it appears from the record, that such rights were specially set up or claimed in the state court, in such a manner as to bring it to the attention of that court. Green Bay and Mississippi Canal Company v. Patten Paper Company, 172 U. S. 58, 67, 68, 43 L. Ed. 364.

The Court of Appeals affirmed the decision of the trial court, and in the opinion it manifestly appears that the Court of Appeals took direct cognizance of said motion for a mistrial, and in so doing could not have failed to see that the federal question was directly and unmistakably incorporated in said motion for a mistrial.

Quoting from Green Bay and Mississippi Canal Company v. Patten Paper Company, supra, we find the following:

> "It must appear from the record in the case, either that the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment.
>
> "If it appears from the record, by clear and necessary intendment, that the federal question must have been directly invoked so that the state court could not have given judgment without deciding it, that will be sufficient."

Other cases believed to support jurisdiction: Powell v. Brunswick, 37 L. Ed. 1137, 150 U. S. 440; Oxley Stave Company v. Butler Company, 41 L. Ed. 1147, 166 U. S. 648; New York ex rel. Bryant v. Zimmerman, 73 L. Ed. 187, 278 U. S. 63.

Petitioner's reliance for a reversal of the case, in the state courts, was what was claimed to be a denial of rights under the "due process" clause. These asserted rights were embodied in a motion for a mistrial, that said rights so set up and claimed show that the federal question was directly invoked in the trial court, and on appeal was before the Court of Appeals, and that said court could not have given judgment without deciding it, or considering the federal rights claimed.

Petitioner recognizes that a state is free to regulate procedure of its courts, in accordance with its own conceptions of policy, unless, in so doing, it offends some principle of justice, so rooted in the traditions and conscience of the people as to be ranked as fundamental. Brown v. State of Mississippi, Supra.

Petitioner respectfully submits that "due process" of law contemplates trial in a criminal case which adheres to established procedure, that is, "the law of the land," and having been denied this fundamental right, petitioner was deprived of a fair and impartial trial under the "due process" clause of the Constitution.

Of these elements of fundamental safeguard, an accused may not be deprived either by statute or rule of court.

When the provisions of statutes or rules of court collide with provisions of the Constitution, they must give way. Henderson v. The State of Florida, 20 So. 2d 651, 155 Fla. 487.

Petitioner respectfully requests that this petition be granted, directing the Court of Appeals of Alabama to reverse the judgment of the Circuit Court of Jefferson County, Alabama, and set aside the order of said Court of Appeals in affirming said cause.

Respectfully submitted,

MATT H. MURPHY, JR.,

Attorney for Petitioner.

APPENDIX.

In the
Court of Appeals of the State of Alabama.

Thomas Floyd Robinson,
Petitioner,

vs.

The State of Alabama,
Respondent.

6th Div. No. 618.

NOTICE OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Si Garrett, Attorney General of the State of Alabama:

Notice is hereby given that Thomas Floyd Robinson, the petitioner above named, hereby petitions the Supreme Court of the United States, for a writ of certiorari to reverse the judgment of the Court of Appeals of Alabama, affirming the judgment of conviction entered herein on December 1, 1953.

Matt H. Murphy, Jr.,
Attorney for Petitioner.

State of Alabama,
Jefferson County.

I, Matt H. Murphy, Jr., attorney of record for Thomas Floyd Robinson, Petitioner herein, having been first duly sworn, deposeth and saith, that on the 8th day of July, 1954, I served a copy of the foregoing petition for certio-

rari and the foregoing notice, on the Hon. Si Garrett, Attorney General of Alabama, Counsel of Record for the State of Alabama, Respondent herein.

Matt H. Murphy, Jr.

State of Alabama,
Jefferson County.

Sworn to and subscribed before me, Floyd G. Ansley, a Notary Public in and for said County in said State, on this the 9th day of July, 1954.

Floyd G. Ansley,
(Seal) Notary Public.

The State of Alabama—Judicial Department.

The Alabama Court of Appeals.

October Term, 1953-54.

6 Div. 618.

Thomas Floyd Robinson

v.

State.

Appeal from Jefferson Circuit Court.

Price, Judge.

Appellant was convicted under an indictment charging him with the carnal knowledge of, or abuse in the attempt to carnally know, a girl under twelve years of age; and was sentenced to the penitentiary for ten years.

The evidence for the State was to the effect that Marty Binzel, a little girl nine years of age, and her younger brother rode their bicycles to the Shades Cahaba School

Defend-
in Homewood, on the afternoon of July 2, 1952. Defe project
ant was the foreman in charge of a construction proj l build-
involving the addition of a gymnasium to the school bu
ings. ding to

Defendant invited the children inside the building After
look at some blueprints of the new construction. A fendant
a few minutes the little boy went outside and defend where,
invited the little girl into a bathroom or toilet, wh knowl-
according to the prosecutrix, he had actual carnal kno
edge of her. testified

One of the workmen employed at the project testie rooms
he saw the children with defendant in one of the ro
looking at the blueprints. all abra-

There was expert medical testimony that a small a by medi-
sion and redness of the genital organs, disclosed by m assault
cal examination, could have been caused by an ass x identi-
such as was described in the evidence. Prosecutrix id a police
fied defendant as the man who abused her from a p
line-up next day. eft home

The State's evidence was that prosecutrix left h r.
around 3:00 and was gone 45 minutes or an hour. h to pur-

Defendant testified he went to town after lunch to nd to get
chase some parts for a mortar mixing machine and t and 3:00
a haircut. He returned to the job between 2:30 and y to have
o'clock and went to a filling station a block away to job about
some spark plugs cleaned. He was back on the job a orking on
3:15 and spent the remainder of the afternoon workin
the mixing machine which had broken down.

He testified he saw no children at the school that a that after-
noon and denied the offense. Various witnesses tes s testified
that during the period of time involved defendant ndant was
working on the cement mixer.

The filling station attendant testified in rebuttal fo tal for the
State the spark plugs were cleaned between 1:30 and 0 and 2:00

o'clock, and defendant left the station at 2:00 o'clock. Defendant's rebuttal witness testified defendant came to his barber shop around 1:30 and left about 2:00 o'clock.

Numerous witnesses testified to defendant's good character.

The rule is well established that in a criminal case the defendant is not entitled to the general affirmative charge if the evidence affords a substantial inference against him. **Kabase v. State**, 31 Ala. App. 77, 12 So. 2d 758; **Hargrove v. State**, 147 Ala. 97, 41 So. 972; **Lee v. State**, 246 Ala. 69, 18 So. 2d 706. Clearly, under the evidence adduced, the general charge was properly refused.

Appellant's counsel argues for a reversal two occurrences during the trial. The first of such incidences complained of was that Alvin Binzel, seven-year-old brother of prosecutrix, was called as a witness by defendant. Reverend Herman Lowery was brought from defense witness room and caused to stand before the witness. In response to questioning by defense counsel the little boy said he didn't see this man at the school and didn't think he had ever seen him before. At this point defendant's counsel informed the court it had been reported to him that someone in the courtroom was signalling to the witness.

The court admonished the spectators and advised them that any person found to be conveying directions to the witness as to how he should answer questions would be held in contempt of court and would be dealt with accordingly.

The jury was caused to retire and the offending spectator was called before the court. This was found to be Mr. Binzel, the father of the witness. He denied giving directions to his son as to how the questions should be answered,

and stated he merely nodded his head in assent after the answers were made by the witness.

Defendant moved for a mistrial on the grounds the nodding of the father's head in consent or assent to the testimony given by the son was done in the jury's presence, and may have prejudiced the witness in testifying.

The court asked the little boy if he saw his father making any signals and the witness stated he saw his father shake his head once after he had answered a question.

The court overruled the motion for a mistrial and defendant reserved an exception. When the jury was brought back they were interrogated by the court as to whether they had observed Mr. Binzel while the child was testifying. Two jurors answered they saw him reading a newspaper or magazine.

Later in the trial defense counsel recalled the little boy to the stand and in the presence of the jury questioned him as to whether his answers to the questions had been given in response to the nods and shakes of his father's head. The witness said his father had talked with him the day before he was on the stand and told him to answer the questions "yes" or "no." He was looking at his father when he was asked whether he had ever seen Mr. Lowery, and he saw his father shaking his head right after the question was asked, and when another question was asked his father shook his head up and down. The court asked: "Was that before or after you answered the question?" The answer was: "It was after."

Defendant again moved for a mistrial. The court overruled the motion and defendant excepted.

Mr. Binzel was then recalled to the stand by defendant. He stated he had told his son to tell the truth and to answer the questions "yes," or "no." After his son had said he didn't think he had ever seen Mr. Lowery he nodded his head in assent.

In situations such as is here presented it is well settled that since the trial court had the opportunity to see and hear everything that transpired, of necessity, much must be left to his sound discretion and his rulings will not be disturbed unless it clearly appears that such discretion has been abused. **Swindle v. State**, 27 Ala. App. 549, 176 So. 372; **Wyatt v. State**, 36 Ala. App. 125, 57 So. 2d 350, cert. den. 57 So. 2d 366. We cannot say the action of the court constituted an abuse of the sound discretion vested in him.

The second point argued in appellant's brief occurred during the Solicitor's closing argument. We quote again from the record:

> "Mr. Murphy, Jr.: I object to some reference to some Vice-President, as some other case—res inter alias acta in Mr. Perry's argument. It is incompetent and immaterial and not part of this case, and has no bearing on this case; it is going outside the realm of proper argument.
>
> Mr. Perry: I am talking about sex fiends and men like this and how they operate.
>
> The Court: I think it is illustrative. Overrule.
>
> Mr. Murphy, Jr.: We except."

Counsel cites and relies upon the decisions of the courts which hold that a trial judge should be careful to say nothing during the progress of a case which can be construed to the prejudice of accused and argues, "At this point, we have the solicitor calling the defendant a 'sex fiend,' and it is manifest that the court concurred in the opinion of the solicitor, for the court said that the solicitor's remark was 'illustrative,' which means to illustrate or exhibit distinctly. In other words, the solicitor had, in the opinion of the judge, correctly described the defendant, and was anxious for the jury to know what he,

the judge, thought about him, this remark constituting as flagrant an invasion of the province of the jury as was ever attempted by a judge in a court of justice."

The fallacy of such argument is that, as we interpret the record, defendant's exception was to the court's overruling of the objection to the Solicitor's argument and not to the court's remarks. In the absence of an exception to the statements of the court they cannot be considered by us on appeal. **Stokley v. State**, 254 Ala. 534, 49 So. 2d 284; **Thomas v. State**, 126 Ala. 4, 28 So. 591; **O'Neal v. State**, 18 Ala. App. 425, 93 So. 49; **Davis v. State**, 20 Ala. App. 131, 101 So. 171.

It is permissible for a Solicitor to comment upon the evils generally of the crime which the law he is seeking to enforce intends to prevent. **Dollar v. State**, 99 Ala. 236, 13 So. 575; **Pitman v. State**, 148 Ala. 612, 42 So. 993.

From the recitals in the record we are not informed as to what the Solicitor really said, therefore this ruling of the court is not presented for our review. 7 Ala. Dig. Crim. Law 1119 (4), and cases cited.

No reversible error appearing in the record, the judgment of the trial court is affirmed.

Affirmed.